IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 24TH SEPTEMBER 2007 / 2ND ASWINA 1929

RSA.No. 519 of 2004()

(AGAINST THE JUDGMENT AND DECREE DATED 29/11/2000 IN AS.18/2000 OF THE COURT OF THE ADDL.DISTRICT JUDGE, ALAPPUZHA & AGAINST THE DECREE AND JUDGMENT IN O.S.NO.73/1998 DATED 15/12/1999 OF THE COURT OF THE PRINCIPAL SUB JUDGE, ALAPPUZHA

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APPELLANT/RESPONDENT/PLAINTIFF:

THANKAMONY VIJAYAN, W/O. VIJAYAN PILLAI PADINJARE THUNDU PARAMBU, PAZHAVEEDU P.O., ALAPPUZHA.

BY ADV. SRI.S.SREEKUMAR
SRI.ANIL V.NAIR

RESPONDENT: APPELLANT/DEFENDANT;

K. PRABHAKARAN, S/O. KRISHNAN, NANDAVANOM NEW HOUSE, PAZHAVEEDU P.O., ALAPPUZHA.

BY ADV. SRI.J.OM PRAKASH

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 24/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

KSS

ORDER ON I.A.NO.1427/2004 IN R.S.A.NO.519/2004

DISMISSED

24/09/2007 **SD/-M.SASIDHARAN NAMBIAR,JUDGE**

/TRUE COPY/

P.S.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 519 OF 2004

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Dated this the 24th day of September, 2007

JUDGMENT

Plaintiff in O.S.73/1998 on the file of Sub Court, Alappuzha is the appellant. Defendant is the respondent. Appellant instituted the suit seeking a decree for realisation of Rs.1,04,000/- due from the respondent. It was contended in the plaint that respodnent borrowed Rs.1,04,000/- from appellant and issued Ext.A1 cheque on 1.5.1998 drawn in his account maintained in Pazhaveedu branch of State Bank of Travancore and when the cheque was presented for encashment, it was dishonoured for want of sufficient funds and appellant sent Ext.A2 notice demanding the amount covered by the cheque, but respondent sent Ext.A5 reply disputing the case and contending that he did not issue any cheque or borrowed any amount and therefore appellant is entitled to the decree sought for. Respondent in his written statement

contended that he did not borrow any amount from appellant and did not issue any cheque and the cheque is not supported by consideration and he had sent a proper reply and appellant is not entitled to the decree.

2. Before the trial court appellant was examined as PW1 and respondent as DW1 and Exts.A1 to A4 were marked. Learned Munsiff on the evidence believed PW1 and disbelieved DW1 and granted a decree directing respondent to pay Rs.1.04,000/- with 18% interest. It was challenged before District Court, Alappuzha in A.S.18/2000. Learned District Judge on reappreciation of evidence found that evidence was not properly appreciated by the trial court. Finding that execution of Ext.A1 cheque and the borrowal were disputed by respondent even in Ext.A4 reply, learned District Judge found that question whether signature in Ext.A1 is that of the respondent was not considered by the trial court. Comparing the signature seen in Ext.A1 with the signature of respondents in the

vakalath, written statement and the affidavit filed by respondent before the trial court, learned Additional District Judge found that there is no similarity in the signatures. It was also found that there is no acceptable evidence to prove that any amount was borrowed by respondent or respondent issued Ext.A1 cheque towards repayment of the amount due. In such circumstance it was held that appellant is not entitled to the decree sought for. Appeal was allowed and the decree granted by the trial court was set aside. It is challenged in the second appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of learned counsel appearing for appellant is that first appellate court should not have compared the signature seen in Ext.A1 with the signature of the respondent in his vakalath, written statement and other affidavits filed before the trial court, without the aid of an expert and therefore findings of the first appellate court

that Ext.A1 cheque was not issued by the respondent is unsustainable. It was also argued that trial court which had the opportunity to note the demeanour of the witnesses believed the evidence of PW1 and disbelieved the evidence of respondent and in such circumstance, first appellate court was not at all justified in reversing the decree.

5. On hearing the learned counsel I do not find any substantial question of law involved in the appeal.

6. If the first appellate court has relied on its opinion, on comparing the signature seen in Ext.A1 alone for deciding the dispute, argument of the learned counsel could have been accepted. But decision was not solely based on the comparison of the signature seen in Ext.A1. It is pertinent to note that what is pleaded in the plaint was that respondent borrowed Rs.1,04,000/- and issued Ext.A1 cheque on 1.5.1998. There was no case in the plaint that amount was borrowed earlier and Ext.A1 cheque was issued towards the repayment of that

amount when demanded. If that was the case, appellant would have pleaded that case specifically and in any event would not have pleaded that respondent borrowed the amount and he issued Ext.A1 cheque. When the respondent denied the borrowal, as well as the issuance of the cheque what was deposed by appellant as PW1 was that respondent borrowed the amount in three instalments in March 1988 and issued Ext.A1 cheque. Apart from the interested version of PW1, there is no evidence to support any such payment. Plaint does not disclose the three payments. The argument of learned counsel is that nobody else was present at the time of the transaction apart from PW1 and when the trial court believed his evidence, first appellate court should not have reversed that finding. It cannot be disputed that first appellate court has the jurisdiction to appreciate the evidence like the trial court. First appellate court was also justified in finding that if Ext.A1 cheque was issued towards the repayment of the

amount borrowed earlier, that would have been specifically pleaded in the plaint. In the absence of such a plea, the case of appellant as PW1 that the amount was borrowed by respondent in three instalments was rightly disbelieved by the first appellate court.

7. When the transaction was denied and it was contended that respondent did not execute the cheque, burden is on the appellant to prove that respodent borrowed the amount and also issued the cheque. Though learned counsel appearing for appellant argued that first appellate court should not have compared the signature in Ext.A1 cheque without getting the opinion of an expert, nothing was pointed out why appellant did not get Ext.A1 examined by an expert,especially when even in Ext.A4 reply respondent denied the execution of the cheque. Learned counsel also argued that when respondent did not give any possible explanation for the custody of the cheque with the appellant case of the appellant should have been accepted.

True, when Ext.A1 cheque was produced by appellant and it was admitted that it is a cheque drawn in the account maintained by respondent, respondent has a duty to explain the custody of the cheque by appellant. But for the failure to explain the custody of cheque by appellant, in the absence of evidence to prove that amount was borrowed and cheque was issued in discharge the liability, appellant is not entitled to the decree sought for. In such circumstance, the factual findings of first appellate court that appellant failed to prove that respondent borrowed the amount and issued Ext.A1 cheque towards the discharge of the liability, cannot be interfered with by reappreciation of evidence in exercise of the powers of this court under section 100 of Code of Civil Procedure. Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006